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Karak Land Sdn Bhd v Chia Soo Nee

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HIGH COURT (KUALA LUMPUR) — APPEAL NO WA-12BNCvC-58–08 OF 2020
QUAY CHEW SOON JC
9 JULY 2021

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Civil Procedure — Striking out — Application for — Application to strike out appeal — Whether striking out application ought to be allowed

D

Land Law — Easement — Claim for easement fees — Respondent and appellant entered into sale and purchase agreement of land — Respondent discovered stream flowing through land — Whether appellant used respondent's land as easement

E

Tort — Damages — Claim for damages for nuisance, negligence and trespass — Respondent and appellant entered into sale and purchase agreement of land — Respondent discovered stream flowing through land — Whether appellant owed duty of care to respondent — Whether appellant caused nuisance to respondent — Whether respondent entitled to damages

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This was an appeal lodged by the appellant ('defendant') against a judgment after a full trial of the sessions court judge ('SCJ') in which the SCJ had allowed the respondent's ('plaintiff') claim. The plaintiff in turn filed an application to strike out the appeal. The plaintiff and the defendant had entered into a sale and purchase agreement ('SPA') for the sale and purchase of a piece of agricultural land ('Lot 301') for the price of RM286,500. The plaintiff did not inspect Lot 301 before the purchase and had selected Lot 301 based on the scale model at the defendant's sales gallery, which did not show that there was a stream flowing in Lot 301. The plaintiff selected Lot 301 as it appeared flat and there was a drain outside but by the edge of Lot 301 for drainage. The scale model showed a drainage reserve would be built but the same was not built. It was represented to the plaintiff that the drain would be built. The plaintiff was shocked when he discovered for the first time in November 2018 that there was a stream flowing through the land. The plaintiff explained that when it rained, the stream flowing into Lot 301 would flood and three-quarters of his land would be flooded and both sides of the riverbanks had eroded. The water from the monsoon drain flowing into the plaintiff's land caused nuisance and he was unable to use his land to plant durians or other plants. The plaintiff testified that the defendant had used Lot 301 as easement for the stream, which he

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apparently did not agree to. The value of the land had depreciated as a result of the stream flowing through Lot 301. The SCJ found that the defendant owed the plaintiff a duty of care which appeared to have arisen from the alleged representation, vide the scale model and that a monsoon drain would be built on the drainage reserve ('the alleged misrepresentation'). The SCJ allowed the plaintiff's claim and awarded, inter alia: (a) RM60,000 per year for the plaintiff's land to be used as a water easement until he decided that his land was no longer required as easement; (b) general damages for nuisance, exemplary damages and aggravated damages; and (c) RM250,000 for depreciation of land value. Hence, this appeal.

Held, allowing the appeal:

(1) The SPA stipulated that the plaintiff was not entitled to claim for damages or compensation for any alteration to the condition, state and nature of Lot 301 whether arising out of land development works, erosion or other like cause. In the face of such contractual provision, a duty of care to ensure rainwater does not flood the plaintiff's land could not arise. Neither could the plaintiff's complaints that there were soil erosion or flood during rain causing a gorge be the basis of a claim. This was especially considering that the plaintiff had precisely chosen and bought Lot 301 due to the stream flowing through it. Despite the plaintiffs' contention that he did not inspect Lot 301 prior to the execution of the SPA, the SPA provided that 'the purchaser has inspected the same and shall be deemed to have done so prior to the execution of this agreement'. Parties must be bound by the contract that they had executed, save where there is fraud or misrepresentation. They could not be permitted to renege on the same merely on the grounds that they had not read or understood the terms of the contract (see paras 14–15).

(2) The plaintiff's evidence in relation to the alleged misrepresentation could not give rise to a duty of care. More pertinently, the plaintiff's case was based on negligence, nuisance and trespass where he claimed for easement fees. It was not based on the SPA or any alleged misrepresentation made. The SCJ did not at all consider the terms of the SPA in finding the defendant liable for negligence and nuisance based on the alleged misrepresentation. Having elected to frame his case based on negligence, nuisance and trespass, the plaintiff was precluded from retreating to rely on the alleged misrepresentation. This was especially considering that the alleged misrepresentation was not pleaded (see paras 20–21).

(3) Since there was a pre-existing stream flowing through Lot 301 itself, which was the reason why the plaintiff bought the land in the first place, the defendant could not be said to have brought water into the plaintiff's land or caused any flood therein during rain. Neither could the plaintiff

complain that he did not permit the stream to flow through Lot 301 when that was the precise reason why he bought the land. The water flowing into Lot 301 was beyond the defendant's control and neither did the defendant cause it. Thus, the defendant could not be said to have caused nuisance to the plaintiff. Further, the defendant could not be faulted for the natural gravitational occurrence of the water flow (see paras 24–25).

(4) The SCJ erred in finding a duty of care based on the alleged misrepresentation, when it was not pleaded in the first place. The failure to particularise the alleged misrepresentation would render such allegation to become a bare allegation. Further, by failing to particularise the alleged misrepresentation, let alone particularise if such misrepresentation was fraudulent or negligent misrepresentation, the misrepresentation would be taken as an innocent misrepresentation that did not give rise to a claim for damages (see paras 33–34).

(5) The defendant was the vendor/developer and not the adjoining landowner. As such, it was legally not possible for the defendant to be treated as the dominant landowner using the plaintiff's servient land as easement to discharge the water. Further, an easement could not be presumed based on mere usage. It needed to be expressly granted and registered. Crucially, the sessions court had exceeded its jurisdiction by granting the easement fees and in effect granting/recognising the easement without registration of the same. The sessions court did not have jurisdiction to deal with actions relating to immovable properties. The SCJ erred in allowing easement fees of RM60,000 per year, which in effect granted/recognised an easement granted by the plaintiff to the defendant. Moreover, the easement fees of RM60,000 to be paid yearly until the plaintiff decided that Lot 301 was no longer needed as an easement, was without any substantiation (see paras 38–40 & 42).

(6) The SCJ allowed the plaintiff's special damages claim of RM250,000 for diminution of land value. However, the SCJ did not make any finding on whether the plaintiff proved its special damages claim of RM250,000. It was trite that special damages must be strictly proven. The SCJ ought to have found that the plaintiff failed to prove his special damages for diminution of land value. Instead, it was allowed without any grounds proffered (see paras 44 & 46).

(7) The plaintiff's striking out application was made under O 18 r 19(1)(a), (b), (c) and/or (d) of the Rules of Court 2012 ('O 18 r 19'). However, O 18 r 19 only applied to striking out 'pleading or the endorsement, of any writ'. The plaintiff was relying on O 18 r 19 to strike out the appeal, which was not a pleading or an endorsement of writ. As such, the plaintiff's reliance on O 18 r 19 was clearly misplaced. On this ground alone, the striking out application ought to be dismissed. Furthermore,

the grounds of the striking out application largely related to the merits of the appeal. By virtue of s 28(1) of the Courts of Judicature Act 1964, the defendant was entitled to file the appeal so long as the amount in dispute or the value of the subject matter was more than RM10,000. Since the sessions court had allowed, inter alia, the plaintiff's claim for depreciation of land value for RM250,000, the defendant was therefore entitled to file the appeal (see paras 50–51).

[Bahasa Malaysia summary

Ini adalah rayuan yang diajukan oleh perayu ('defendan') terhadap penghakiman selepas perbicaraan penuh hakim mahkamah sesyen ('SCJ') di mana SCJ telah membenarkan tuntutan responden ('plaintif'). Plaintif pula memfailkan permohonan untuk membatalkan rayuan itu. Plaintif dan defendan telah memeterai perjanjian jual beli ('SPA') untuk jual beli sebidang tanah pertanian ('Lot 301') pada harga RM286,500. Plaintif tidak memeriksa Lot 301 sebelum pembelian dan telah memilih Lot 301 berdasarkan model skala di galeri jualan defendan, yang tidak menunjukkan bahawa terdapat aliran sungai mengalir di Lot 301. Plaintif memilih Lot 301 kerana ia kelihatan rata dan terdapat longkang di luar dan di tepi Lot 301 untuk saliran. Model skala menunjukkan rizab saliran akan dibina tetapi ia tidak dibina. Ia telah direpresentasi kepada plaintif bahawa longkang itu akan dibina. Plaintif terkejut apabila dia mendapati buat kali pertama pada November 2018 bahawa terdapat aliran sungai mengalir melalui tanah tersebut. Plaintif menjelaskan bahawa apabila hujan turun, aliran sungai mengalir ke Lot 301 akan banjir dan tiga perempat daripada tanahnya akan dinaiki air dan kedua-dua belah tebing sungai telah terhakis. Air dari longkang monsun yang mengalir ke tanah plaintif menyebabkan kacau ganggu dan dia tidak dapat menggunakan tanahnya untuk menanam durian atau tumbuhan lain. Plaintif memberi keterangan bahawa defendan telah menggunakan Lot 301 sebagai ismen untuk aliran sungai itu, yang nyata dia tidak bersetuju. Nilai tanah itu telah susut nilai akibat daripada aliran sungai mengalir melalui Lot 301. SCJ mendapati defendan mempunyai kewajipan berjaga-jaga terhadap plaintif yang timbul daripada salah nyata yang didakwa, mengikut model skala dan longkang monsun yang akan dibina di atas rizab saliran ('salah nyata yang didakwa'). SCJ membenarkan tuntutan plaintif dan memberi award, antara lain: (a) RM60,000 setahun untuk tanah plaintif digunakan sebagai ismen air sehingga dia memutuskan bahawa tanahnya tidak lagi diperlukan sebagai ismen; (b) ganti rugi am untuk kacau ganggu, ganti rugi teladan dan ganti rugi teruk; dan (c) RM250,000 untuk susut nilai tanah. Oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan:

(1) SPA menetapkan bahawa plaintif tidak berhak menuntut ganti rugi atau pampasan bagi apa-apa perubahan kepada bentuk, keadaan dan sifat Lot 301 sama ada berpunca daripada kerja-kerja pembangunan tanah,

hakisan atau sebab lain yang serupa. Dalam menghadapi peruntukan kontrak tersebut, kewajipan berjaga-jaga untuk memastikan air hujan tidak membanjiri tanah plaintif tidak boleh timbul. Begitu juga aduan plaintif bahawa terdapat hakisan tanah atau banjir semasa hujan menyebabkan gaung tidak boleh dijadikan asas tuntutan. Ini terutamanya memandangkan plaintif telah memilih dan membeli Lot 301 kerana aliran sungai mengalir melaluinya. Walaupun dakwaan plaintif bahawa beliau tidak memeriksa Lot 301 sebelum pelaksanaan SPA, SPA memperuntukkan bahawa 'the purchaser has inspected the same and shall be deemed to have done so prior to the execution of this agreement'. Pihak-pihak mesti terikat dengan kontrak yang telah mereka laksanakan, kecuali jika terdapat penipuan atau salah nyata. Mereka tidak boleh dibenarkan untuk mengingkari perkara yang sama semata-mata atas alasan bahawa mereka tidak membaca atau memahami terma kontrak (lihat perenggan 14–15).

(2) Keterangan plaintif berhubung dengan salah nyata yang didakwa tidak boleh menimbulkan kewajipan berjaga-jaga. Lebih penting lagi, kes plaintif adalah berdasarkan kecuaian, kacau ganggu dan pencerobohan di mana dia menuntut yuran ismen. Ia bukan berdasarkan SPA atau sebarang salah nyata yang didakwa yang dibuat. SCJ tidak sama sekali mempertimbangkan terma SPA dalam menemukan defendan bertanggungjawab atas kecuaian dan kacau ganggu berdasarkan salah nyata yang didakwa. Setelah memilih untuk merangka kesnya berdasarkan kecuaian, kacau ganggu dan pencerobohan, plaintif dihalang daripada berundur untuk bergantung pada salah nyata yang didakwa. Ini terutamanya memandangkan salah nyata yang didakwa tidak diplid (lihat perenggan 20–21).

(3) Memandangkan terdapat aliran sungai mengalir sedia ada melalui Lot 301 itu sendiri, yang merupakan sebab mengapa plaintif membeli tanah itu pada mulanya, defendan tidak boleh dikatakan telah membawa air ke dalam tanah plaintif atau menyebabkan sebarang banjir semasa hujan. Plaintif juga tidak boleh mengadu bahawa dia tidak membenarkan aliran itu mengalir melalui Lot 301 sedangkan itulah sebab yang tepat mengapa dia membeli tanah itu. Air yang mengalir ke Lot 301 adalah di luar kawalan defendan dan defendan juga tidak menyebabkannya. Oleh itu, defendan tidak boleh dikatakan telah menyebabkan kacau ganggu kepada plaintif. Selanjutnya, defendan tidak boleh dipersalahkan untuk kejadian graviti semula jadi bagi aliran air (lihat perenggan 24–25).

(4) SCJ terkhilaf dalam menemukan kewajipan berjaga-jaga berdasarkan salah nyata yang didakwa, apabila ia tidak diplid pada mulanya. Kegagalan untuk mengkhususkan salah nyata yang didakwa akan menjadikan dakwaan tersebut menjadi dakwaan kosong. Selanjutnya, dengan gagal mengkhususkan salah nyata yang didakwa, apatah lagi

mengkhususkan jika salah nyata tersebut adalah penipuan atau salah nyata cuai, salah nyataan itu akan dianggap sebagai salah nyata yang tidak bersalah yang tidak menimbulkan tuntutan ganti rugi (lihat perenggan 33–34).

(5) Defendan ialah vendor/pemaju dan bukan pemilik tanah bersebelahan. Oleh itu, dari segi undang-undang tidak mungkin defendan boleh dianggap sebagai pemilik tanah menguasai menggunakan tanah menanggung plaintif sebagai kemudahan untuk melepaskan air. Selanjutnya, ismen tidak boleh dianggap berdasarkan penggunaan semata-mata. Ia perlu diberikan dan didaftarkan dengan nyata. Yang penting, mahkamah sesyen telah melampaui bidang kuasanya dengan memberikan yuran ismen dan sebenarnya memberikan/mengiktiraf ismen tanpa pendaftaran. Mahkamah sesyen tidak mempunyai bidang kuasa untuk menangani tindakan berkaitan harta tak alih. SCJ terkhilaf dalam membenarkan yuran ismen sebanyak RM60,000 setahun, yang sebenarnya telah memberikan/mengiktiraf suatu ismen yang diberikan oleh plaintif kepada defendan. Selain itu, yuran ismen sebanyak RM60,000 perlu dibayar setiap tahun sehingga plaintif memutuskan bahawa Lot 301 tidak lagi diperlukan sebagai ismen, adalah tanpa sebarang bukti (lihat perenggan 38–40 & 42).

(6) SCJ membenarkan tuntutan ganti rugi khas plaintif sebanyak RM250,000 untuk pengurangan nilai tanah. Walau bagaimanapun, SCJ tidak membuat sebarang penemuan sama ada plaintif membuktikan tuntutan ganti rugi khasnya sebanyak RM250,000. Adalah mantap bahawa ganti rugi khas mesti dibuktikan. SCJ sepatutnya mendapati bahawa plaintif gagal membuktikan ganti rugi khasnya untuk pengurangan nilai tanah. Sebaliknya, ia dibenarkan tanpa sebarang alasan yang dikemukakan (lihat perenggan 44 & 46).

(7) Permohonan pembatalan plaintif telah dibuat di bawah A 18 k 19(1)(a), (b), (c) dan/atau (d) Kaedah-Kaedah Mahkamah 2012 ('A 18 k 19'). Walau bagaimanapun, A 18 k 19 hanya memohon untuk membatalkan 'pleading atau pengesahan, mana-mana writ'. Plaintif bergantung pada A 18 k 19 untuk membatalkan rayuan, yang merupakan bukan pliding atau pengesahan writ. Oleh yang demikian, pergantungan plaintif terhadap A 18 k 19 adalah jelas salah. Atas alasan ini sahaja, permohonan pembatalan itu sepatutnya ditolak. Tambahan pula, alasan permohonan pembatalan sebahagian besarnya berkaitan dengan merit rayuan. Berdasarkan s 28(1) Akta Mahkamah Kehakiman 1964, defendan berhak memfailkan rayuan selagi jumlah yang dipertikaikan atau nilai perkara itu melebihi RM10,000. Oleh kerana mahkamah sesyen telah membenarkan, antara lain, tuntutan plaintif untuk susut nilai tanah sebanyak RM250,000, maka defendan berhak memfailkan rayuan (lihat perenggan 50–51).]

Cases referred to

Admiral Cove Development Sdn Bhd v Balakrishnan a/l Devaraj & Anor [2011] 5 MLJ 309, FC (refd)
Annie Quah Lay Nah v Syed Jafer Properties Sdn Bhd & Ors [2007] 1 MLJ 225 atp 229; [2007] 1 CLJ 1, CA (folld)
Arnica Corp Sdn Bhd v Robert Teo Keng Tuan & Anor and other appeals [2016] 2 MLJ 119; [2015] 1 LNS 1220, CA (refd)
Balakrishnan a/l Devaraj & Anor v Admiral Cove Development Sdn Bhd [2010] MLJU 576; [2010] 7 CLJ 152, CA (refd)
Cergas Tegap Sdn Bhd (In Liquidation) v SAP Holdings Bhd & Anor [2013] 8 CLJ 745, CA (folld)
Cosway (M) Sdn Bhd & Anor v Gan Poh Im [2006] 1 MLJ 568; [2005] 1 CLJ 573, CA (refd)
Cottage Home Sdn Bhd v Wong Kau @ Wong Kon Lin & Anor [2014] 3 MLJ 580, CA (refd)
Esso Malaysia Bhd v Hills Agency (M) Sdn Bhd & Ors [1994] 1 MLJ 740, HC (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1 at p 8; [2004] 4 CLJ 309, FC (refd)
Gibbons v Lenfestey (1915) 84 LJ PC 158, PC (refd)
Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors and other appeals [2015] 1 MLJ 773, FC (refd)
Ipmuda Trading Sdn Bhd v Khoo Kiat Piau t/a Ying's Trading Co & Anor [1996] 5 MLJ 637, HC (refd)
Lim Kek Ping & Anor v Thai Wah Construction & Development Sdn Bhd & Ors [2012] 10 MLJ 815, HC (folld)
Ong Ah Long v Dr S Underwood [1983] 2 MLJ 324, FC (refd)
Ooi Yoke In & Anor v Public Finance Bhd [1992] MLJU 25 at 15–16; [1993] 2 CLJ 464, HC (refd)
Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim [2003] 3 MLJ 460, CA (refd)
Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1993] 1 MLJ 443, HC (refd)
Yoong Sze Fatt v Pengkalan Securities Sdn Bhd [2010] 1 MLJ 85, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 28(1)
Federal Constitution art 8
Rules of Court 2012 O 2 r 1, O 3 r 5, O 18 rr 12, 19(1)(a), (1)(b), (1)(c), (1)(d)
Subordinate Courts Act 1948 ss 69, 70

Alan Wong (Andrew Heng and Roger Leong with him) (Zain Megat & Murad) for the appellant.

Aaron Pang Kok Kang (Aaron Pang & Co) for the respondent.

Quay Chew Soon JC:

INTRODUCTION

[1] The appellant/defendant lodged an appeal ('appeal') against a judgment after full trial of the learned sessions court judge ('SCJ') dated 27 July 2020. The SCJ had allowed the respondent's/plaintiff's claim. The respondent/plaintiff in turn filed an application vide encl 13 ('striking out application') to strike out the appeal.

[2] I allowed the appeal and set aside the judgment of the SCJ. I also dismissed the striking out applicationhe striking out application. These are the grounds of my decision. The parties will be referred to as they were in the court below. Where the appellant was the defendant ('D') and the respondent was the plaintiff ('P').

FINDINGS OF THE SESSIONS COURT

[3] The SCJ allowed P's claim and awarded P:

(a) RM60,000 per year for P's land to be used as a water easement from 1 January 2019 until he decides that his land is no longer required as easement;

(b) general damages for nuisance, exemplary damages and aggravated damages;

(c) RM250,000 for depreciation of land value;

(d) costs of RM10,000; and

(e) interest on damages from 1 January 2019 to full realisation.

[4] From his grounds of judgment ('GoJ'), the SCJ allowed P's claim on, amongst others, the following grounds:

(a) P qua purchaser and D qua vendor/developer had entered into a sale & purchase agreement dated 31 October 2017 ('SPA') for the sale and purchase of a piece of agricultural land identified as Lot No 301 Karak @ The Valley ('Lot 301');

(b) the purchase price of Lot 301 was RM286,500;

(c) P did not inspect Lot 301 before the purchase and had selected Lot 301 based on the scale model at D's sales gallery. The scale model does not

show that there is a stream ('aliran sungai') flowing in Lot 301;

(d) P selected Lot 301 as Lot 301 appears flat and there is a drain outside but by the edge of Lot 301 for drainage ('terdapat satu parit di tepi luar Lot 301 tersebut untuk aliran air');

(e) the scale model shows a drainage reserve will be built but the same was not built. The SCJ found that D failed to build the drain on the reserve to ensure water does not flow into Lot 301;

(f) P did not know that the drain would not be built. It was apparently represented to P by SD1 that the drain will be built;

(g) referring to the case of *Arnica Corp Sdn Bhd v Robert Teo Keng Tuan & Anor and other appeals* [2016] 2 MLJ 119; [2015] 1 LNS 1220 ('Arnica'), the SCJ found that D owes P a duty of care;

(h) D's witness ('SD2') testified that, if the drainage reserve was built, stream water and rain water would not flow into Lot 301;

(i) P was shocked when he discovered for the first time in November 2018 that there was a stream flowing through the land. P apparently did not allow the stream to flow through Lot 301;

> [26] ... Plaintif menerangkan bahawa terdapat lubang yang dikorek di bahagian hadapan sebelah kiri Lot 301 tersebut, sebatang sungai mengalir dari tepi hadapan sebelah kiri dan masuk ke tengah-tengah Lot 301 ...
>
> [27] Dalam Pemeriksaan Semula oleh peguamcara Plaintif, Plaintif menekankan bahawa beliau tidak bersetuju untuk membenarkan aliran sungai tersebut melalui Lot 301.

(j) P explained that when it rains, the stream flowing into Lot 301 will flood and three-quarters of his land will be flooded. Both sides of the riverbanks have eroded;

(k) the SCJ affirmed P's evidence on the circumstances of Lot 301 during rain by referring to the photographs tendered and video played during trial;

(l) the SCJ found that there was indeed a strong stream ('aliran sungai yang deras') flowing into Lot 301 from the video recording;

(m) the water from the monsoon drain flowing into P's land caused nuisance and he was unable to use his land to plant durians or other plants;

(n) P testified of his intention to plant durian and the losses suffered;

(o) although D did not do anything to change the flow of the stream, P built L drains on Lot 301;

(p) P testified that the land at Lot 301 had eroded and there is a big gorge during rain. Lot 301 was flooded up to three-quarters of its land area. P can only use one-quarter of the land area for plantation;

(q) P had to build a temporary bridge as the stream flows through the middle of Lot 301. P had to build the bridge to access the other side of the Lot 301 to conduct soil testing;

(r) P testified that D had used Lot 301 as easement for the stream, which he apparently did not agree to. The value of his land had depreciated as a result of the stream flowing through Lot 301; and

(s) P claimed for RM60,000 as damages for easement and his evidence was not challenged by D. Except that D contends that the amount is excessive without providing any proof.

[5] From his GoJ, it appears that the SCJ's decision is based on the following:

(a) relying on the case of Arnica, the SCJ found that D owes P a duty of care;

(b) the duty of care appears to have arisen from the alleged representation, vide the scale model and SD1 that a monsoon drain will be built on the drainage reserve ('alleged misrepresentation');

(c) D had breached that duty in failing or neglecting to build the monsoon drain;

(d) D's alleged failure to build the monsoon drain caused the water to flow into Lot 301 vide the stream. P did not consent to the water flowing into Lot 301 which allegedly caused flooding therein;

(e) the water of the monsoon drain caused nuisance to P; and

(f) P testified that he intended to plant durian and suffered losses. Value of Lot 301 apparently depreciated. The claim of RM60,000 as easement fees was not challenged save for D's contentions that it was excessive.

[6] It seems to me that P's case and indeed the appeal centres on the existence of a stream in Lot 301. Which P claims he was not aware of at the time of signing the SPA. However, P's answers during cross-examination show that P was well aware of the stream flowing through Lot 301 That was the precise reason why he picked and bought Lot 301.

> Q: Yes. Uh, dan uh, arahan saya adalah aliran air untuk lot agriculture uh adalah sangat penting. Setuju atau tidak?
>
> A: Aliran air untuk agriculture? Setuju.
>
> Q: Setuju ah. Dan arahan saya juga adalah, Encik Chia, uh sebab uh Encik Chia *membeli lot 301 tersebut adalah kerana terdapat satu aliran air yang melintasi lot 301* tersebut.

A: *Bila tengok dalam model, yea*.

[7] It is also apparent that the SCJ had relied on the Court of Appeal case of *Balakrishnan a/l Devaraj & Anor v Admiral Cove Development Sdn Bhd* [2010] MLJU 576; [2010] 7 CLJ 152 in finding that the 'drainage reserve' on the scale model amounts to a representation. However, the said Court of Appeal case was overturned by the Federal Court in *Admiral Cove Development Sdn Bhd v Balakrishnan a/l Devaraj & Anor* [2011] 5 MLJ 309.

[8] The SCJ also relied on the Court of Appeal case of *Arnica* in finding a duty of care. The SCJ accepted P's submission that the case of *Arnica* is almost identical with the instant case. However, *Arnica* is a dispute between two adjoining landowners. In the present case, D does not own the land besides P's land, Lot 301.

GROUNDS OF APPEAL

[9] D's grounds for appeal are as follows:

(a) the SCJ erred in failing to consider that D does not owe a duty of care to ensure that rain water does not flood into P's land and consequently there is no breach of the same, considering:

  (i) the monsoon drain will not alter the flow of water as Lot 301 was on low land and water will flow into it naturally; and

  (ii) the natural flow of water, ie the stream, is a natural occurrence, which is outside the control of D.

(b) the SCJ erred in failing to consider that the alleged misrepresentation was not pleaded;

(c) in relying on the alleged misrepresentation, which was not pleaded, to establish a duty of care and nuisance, the SCJ erred in not taking into account the contractual provision of the SPA whereby:

  (i) P had examined Lot 301 before execution of the SPA;

  (ii) P agreed that the position, condition, state, nature and character of Lot 301 may change from time to time and P cannot annul the SPA or claim for damages or compensation arising therefrom; and

  (iii) P had purchased Lot 301 on an 'as is where is' basis.

(d) the SCJ erred in granting the remedies relating to easement (easement fees), when:

  (i) the sessions court does not have the jurisdiction to grant the same; and

(ii) D, as developer and not a neighboring landowner, does not need an easement on P's land for the stream, which did not flow from D's land; and

(e) the SCJ erred in awarding RM250,000 as depreciation of land value when P did not proffer any evidence on the same.

(f) the SCJ erred in failing to consider P's demeanour during trial where P had given inconsistent evidence.

[10] I largely agree with the arguments canvassed by D and adopt their submissions in these grounds. In my opinion, the SCJ was plainly wrong. There was insufficient judicial appreciation by him of the evidence. He misapprehended the facts and failed to assess the evidence with the documents at hand. His findings were contrary to the documentary evidence (see the Federal Court case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 at p 8; [2004] 4 CLJ 309 at p 320; the Court of Appeal case of *Yoong Sze Fatt v Pengkalan Securities Sdn Bhd* [2010] 1 MLJ 85 at pp 106–107). Appellate intervention is therefore warranted. My reasons are as follows.

There is no duty of care — Provisions of the SPA

[11] The SCJ relied on the case of *Arnica* in finding that D owes a duty of care to P. This duty of care apparently is to ensure that the rainwater does not flood into P's land, Lot 301. However, the case of *Arnica* relates to a dispute between neighboring landowners. Here, P and D share no such relationship.

[12] The GoJ reads:

> [22] Mahkamah ini merujuk kepada satu kes yang hampir sama dengan kes di hadapan mahkamah ini iaitu kes Mahkamah Rayuan *Arnica Corp Sdn Bhd v Robert Teo Keng Tuan & Anor and other appeals* [2016] 2 MLJ 119; [2015] 1 LNS 1220 di mana mahkamah memutuskan seperti berikut di muka surat 9 para [20]:
>
> [20] As a result, the plaintiff complains that his land was adversely affected by flooding and was damaged due by large amount of water discharged from the said scheme. More particularly the plaintiff complains of the flooding of his lands in or around 28 March 1999 and 31 March 2009. The plaintiff then filed a claim against Arnica based on trespass to land, negligence, nuisance and strict liability under the *Rylands v Fletcher* rule (Civil Suit No 22-16 of 2001).
>
> Duty of care
>
> [32] In relation to the existence of a duty of care, the learned judge correctly applied the 'neighbor' principle as enunciated by Lord Atkin in *Donoghue v Stevenson* [1932] AC 562, namely that the lay of land between the *plaintiff and the defendant as occupiers of adjoining lands* was such that Arnica might reasonably be expected to contemplate that its acts or omissions were likely to affect the plaintiff, in view of the

proximity between the parties. (Emphasis added.)

[13] The SCJ had relied on P's testimony that he did not inspect, or properly inspect, Lot 301 prior to the SPA and apparently did not know about the existing stream. Reliance was also placed on the alleged misrepresentation. However, the SCJ did not consider the material terms of the SPA namely:

> F. Availability of Layout Plan, the site boundary and measurements of the Lot for Inspection
>
> The Layout Plan, the site boundary and measurements of the Lot have been made available to the Purchaser for inspection at the Developer's or their agent's office and the *Purchaser has inspected the same and shall be deemed to have done so* prior to the execution of this Agreement.
>
> 7.9 Overall Development and On-going Construction
>
> (ii) The Purchaser further acknowledges that as the Lot forms part of the overall development of the Project Land and/or the Adjaccent Lands, the position condition state nature and character of the Lot and the overall development of the Project Land and/or the Adjacent Lands may be altered from time to time during the continuance of the said development. Notwithstanding the provisions herein the Purchaser covenants and agrees that *all such alteration of the position condition state nature and character of the Lot* and the overall development of the Project Land and/or the Adjacent Lands *whether arising out of land development works, erosion or other like cause* or as may from time to time be required by the Appropriate Authorities and/or such as may be certified by the Developer's consultant as expedient or necessary *shall not annul this sale nor be subjected to any claim for damages or compensation* by the Purchaser.
>
> 7.10 State and condition of the Lot
>
> i. The Purchaser further represents, warrants and confirms that the Purchaser has or shall be deemed to have inspected the Lot and is satisfied with the condition, state, nature and character of the Lot; and the Purchaser *shall take the Lot as it is and where it is* as at the date hereof. (Emphasis added.)

[14] The SPA stipulates that P is not entitled to claim for damages or compensation for any alteration to the condition, state and nature of Lot 301 whether arising out of land development works, erosion or other like cause. In the face of such contractual provision, a duty of care to ensure rainwater does not flood P's land cannot arise. Neither can P's complaints that there were soil erosion or flood during rain causing a gorge be the basis of a claim. This is especially considering that P had precisely chosen and bought Lot 301 due to the stream flowing through it.

[15] Despite P's contention that he did not inspect Lot 301 prior to execution of the SPA, the SPA provides that 'the Purchaser has inspected the same and shall be deemed to have done so prior to the execution of this

Agreement'. Parties must be bound by the contract that they had executed, save where there is fraud or misrepresentation. They cannot be permitted to renege on the same merely on the grounds that they had not read or understood the terms of the contract.

[16] Support for this proposition can be found in the High Court case of *Ooi Yoke In & Anor v Public Finance Bhd* [1992] MLJU 25 at 15–16; [1993] 2 CLJ 464 at pp 469–470 which said:

> In short, when a document containing contractual terms is signed, then in the absence of fraud, or, misrepresentation, the party signing it is bound, and it is wholly immaterial,
>
> (1) whether he has read the document or not
>
> (2) whether he knows no English and the contents were not explained to him.
>
> In the instant appeal there is no allegation of fraud or misrepresentation and as the hirer has signed the agreement knowing fully well that it was a contract for the purchase of a BMW car, the hirer cannot be heard to say that she did not know the terms of the agreement. This principle applies equally to the guarantor. This ground fails.

[17] In fact, during examination-in-chief, P admitted that he had entered into the project site to inspect the condition of the land:

> Q: Okay. Soalan saya adalah, sebelum Encik Chia tandatangani dokumen tersebut adakah Encik Chia tengok tanah atau lot yang Encik Chia beli iaitu lot 301?
>
> A: Nombor satu, saya pergi beli, saya tengok di tempat penjualan pejabat tanya untuk beli tanah tersebut, jadi lepas itu, ada temu duga *bawak saya pergi site*.

There is no duty of care — Alleged misrepresentation

[18] The SCJ referred to the Court of Appeal case of *Balakrishnan Devaraj* in finding that the 'drainage reserve' on the scale model amounts to a representation and that the same will be built.

> [17] Mahkamah ini merujuk kepada kes Mahkamah Rayuan *[2010] MLJU 576* [2010] MLJU 576; [2010] 7 CLJ 152 di mana mahkamah memutuskan:
>
> > The miniature model cannot be a 'silent model with no such assertion' of such representation alleged by the plaintiffs as held by the trial court. The miniature model speaks, represents and asserts the presence of the sandy beach and the sea and access to them bearing in mind that DWI testified that 'Everything in the miniature model is true.' (paras 33 & 34).
>
> [18] Mahkamah ini juga mendapati bahawa dengan merujuk kepada model dalam pejabat defendan menunjukkan 'drainage reserve' akan dibina. Parit monsoon

tersebut ditunjukkan dalam model defendan di muka surat 12 Ikatan Dokumen Bersama. A

[19] However on appeal, the Federal Court had allowed the appeal by *Admiral Cove*. In relation to the representation (testimony of DW1 in that case) which allegedly induced the contract, the Federal Court said (at p 324): B

> [31] There could be no rescission of an executed contract for innocent misrepresentation. The respondents had elected to affirm the agreement. The innocent misrepresentation complained of related to the physical state of the property, namely, its accessibility directly to the beach. There could not be a rescission of an executed contract where the misrepresentation related to the physical state. *The conversation, if any, between the sale staff of the appellant and the respondent did not amount to a representation inducing the contract*. (Emphasis added.) C

[20] In light of the above, P's evidence in relation to the alleged misrepresentation, whether vide the scale model or SD1, cannot give rise to a duty of care. More pertinently, P's case is based on negligence, nuisance and trespass where he claimed for easement fees. It is not based on the SPA or any alleged misrepresentation made. If indeed P wishes to rely on the alleged misrepresentation, then he should have premised his claim on a breach of the SPA. Which would then entitle D to rely on the contractual defences contained in the SPA. D E

[21] The SCJ did not at all consider the terms of the SPA in finding D liable for negligence and nuisance based on the alleged misrepresentation. Having elected to frame his case based on negligence, nuisance and trespass, P is precluded from retreating to rely on the alleged misrepresentation. This is especially considering that the alleged misrepresentation was not pleaded. F

[22] On the point of election, the Court of Appeal in *Annie Quah Lay Nah v Syed Jafer Properties Sdn Bhd & Ors* [2007] 1 MLJ 225 at p 229; [2007] 1 CLJ 1 at p 8 said: G

> [7] Now, it is a general rule applying strict principles of adjectival law — that once an action has been withdrawn by a notice of discontinuance, there is nothing left on which the court may adjudicate. However, where the parties to a cause or matter have proceeded upon a common assumption that a notice of discontinuance is not to be acted upon, then, the court will not permit either party to assert the propriety of the discontinuance. There is a slightly different way of stating the same proposition. It is this. *If one of the parties to litigation is faced with two mutually exclusive alternatives and he elects to pursue one then he will be estopped from retreating from the position he has adopted by his election*. (Emphasis added.) H I

Nuisance — Defendant did not cause the water to enter into Lot 301

[23] P admitted that he knew about the stream flowing through Lot 301. That was the precise reason why he picked and bought Lot 301. It is precisely on this flowing stream, which was the reason P bought the land, that the SCJ allowed P's claim. Finding that D was liable for negligence and causing nuisance:

> [31] Mahkamah ini mengesahkan keterangan Plaintif tentang keadaan kawasan Lot 301 tersebut semasa hujan dengan merujuk kepada gambar-gambar yang dikemukakan oleh Plaintif di muka surat 3 hingga 9 Ikatan Dokumen Bersama. Mahkamah ini juga merujuk kepada rakaman video dalam dua CD yang diserahkan dan ditandakan sebagai G dan H dan dimainkan rakamanya dalam Mahkamah ini semasa perbicaraan kes ini. Mahkamah ini mendapati bahawa memang *terdapat satu aliran sungai yang deras mengalir ke dalam Lot 301* tersebut semasa rakaman video tersebut diambil.
>
> ...
>
> [33] *Air dari parit monsoon terus mengalir ke dalam Lot 301 tersebut dan menyebabkan kacau ganggu (nuisance) ke atas Lot Plaintif*. (Emphasis added.)

[24] If there is a pre-existing stream flowing through Lot 301 itself, which is the reason why P bought the land in the first place, D cannot be said to have brought water into P's land or caused any flood therein during rain. Neither can P complain that he did not permit the stream to flow through Lot 301 when that was the precise reason why he bought the land. The aforesaid together with the fact that Lot 301 was purchased on an 'as is where is' basis, points toward the fact that P had acquiesced to the stream flowing through Lot 301.

[25] The water flowing into Lot 301 was beyond D's control and neither did D cause it. Thus, D cannot be said to have caused nuisance to P. Further and considering P's reason for choosing Lot 301 due the stream flowing through it, it is noted that a flowing stream cannot be static. It carries water from high land to low land. This point towards the fact that the water naturally flow through the stream because P's land is on lower land compared to those above it. Given that fact, D cannot be faulted for the natural gravitational occurrence of the water flow.

[26] The High Court case of *Lim Kek Ping & Anor v Thai Wah Construction & Development Sdn Bhd & Ors* [2012] 10 MLJ 815 is instructive. It held that as long as the upper landowner did not disturb the natural flow of water by doing some development to his land that would have resulted in a high concentration of water or water flowing at a higher velocity, the lower landowner cannot complain. This is because the owner of higher land have a

right to send down, and there is a corresponding obligation on the owner of lower land to receive natural water. As that is an incident of property arising from the relative levels of their respective lands.

[27] Referring to the Privy Council case of *Gibbons v Lenfestey* (1915) 84 LJ PC 158, the High Court said (at pp 836 and 838):

> *Whether a higher land owner can send water down to lower land owner?*
>
> [49] The crucial issue that arises is whether the defendants could obstruct the natural flow of water from Lot 700 by raising the level of their land and building a retaining wall. The larger question of public interest on this point was framed by Justice Clement Skinner in the interlocutory injunction judgment as follows:
>
> *Does the owner of higher land have a right to send down, and is there a corresponding obligation on the owner of lower land to receive natural water, whether flowing in a defined channel or not, as an incident of property arising from the relative levels of their respective lands*?
>
> [50] As stated by Justice Clement Skinner, there are two lines of authority. In *Medway Investments Pte Ltd v Trustees of the Estate of Cheong Eak Chong* [1997] 3 SLR 40, which was relied on by the plaintiffs, the Singapore Court of Appeal preferred the view expressed in the Privy Council case of *Gibbons v Lenfestey* (1915) 84 LJ PC 158. The case of *Gibbons v Lenfestey* originated from the Royal Court of Guernsey in the Channel Islands which applied the Civil law. The Privy Council said as follows:
>
> > Where two contiguous fields belong to different proprietors, one of which stands upon higher ground than the other, *nature itself may be said to constitute a servitude on the inferior tenement, by which it is obliged to receive the water that falls from the superior*.
>
> ...
>
> [54] Counsel for the defendants submitted that our Federal Court in *Seong Fatt Sawmills Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd* [1984] 1 MLJ 286; [1984] 1 CLJ 291 had followed the principles applied in the case of *Gartner v Kidman*. I have read the said judgment in *Seong Fatt Sawmills Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd*. However, *Gartner v Kidman* was not cited in the said judgment. The right of the lower landowner to erect barriers and pen back the water from the upper neighbours is not discussed either in that judgment. The discussion in the Federal Court judgment focused on negligence and the rule in *Rylands v Fletcher*. I shall respectfully follow the view expressed in the Singapore case of *Medway Investments Pte Ltd v Trustees of the Estate of Cheong Eak Chong*. I am of the opinion that it is erroneous to say that since *Gibbons v Lenfestey* emanated from a civil law jurisdiction, it should not be followed in common law countries. As pointed out by the Singapore Court of Appeal, it has been followed in a number of common law jurisdictions. The principle in *Gibbons v Lenfestey* does not give an absolute and unfettered right to the upper landowner to deal with his land to the detriment of the

lower landowner. It is subject to qualifications according to the circumstances of the case. The underlying principle is that *as long as the upper landowner did not disturb the natural flow of water by doing some development to his land that would have resulted in a high concentration of water or water flowing at a higher velocity, the lower landowner cannot complain*. Conversely, that should also mean that if the lower landowner disturbs the natural flow of water by erecting a barrier such as a bund or retaining wall, he should provide sufficient drainage so as to avoid flooding in the upper neighbours' land. (Emphasis added.)

Alleged misrepresentation not pleaded

[28] The alleged misrepresentation featured prominently in the GoJ:

> [15] Seterusnya Plaintif menerangkan bahawa *berdasarkan kepada model kecil* tersebut, beliau memilih Lot 301 tersebut kerana Lot 301 tersebut nampak rata dan terdapat satu parit di tepi luar Lot 301 tersebut untuk aliran air.
>
> ...
>
> [18] Mahkamah ini juga *mendapati bahawa dengan merujuk kepada model dalam pejabat Defendan menunjukkan 'drainage reserve' akan dibina*. Parit monsoon tersebut ditunjukkan dalam model Defendan di muka surat 12 Ikatan Dokumen Bersama.
>
> [19] Walau bagaimanapun Plaintif menerangkan bahawa sehingga hari perbicaraan, drainage reserve tersebut masih tidak dibina di Lot 301 oleh Defendan. Mahkamah ini *mendapati bahawa Defendan telah enggan atau cuai dalam pembinaan parit monsoon supaya air tidak mengalir ke Lot 301 tersebut*.
>
> ...
>
> [21] SD1 iaitu seorang Pengurus Projek dalam keterangannya semasa disoal balas oleh peguam cara Plaintif menerangkan bahawa parit tersebut akan dibina mengalirkan keluar air dari Lot 301. (Emphasis added.)

[29] The testimony of SD1, cited at para [21] of the GoJ above, had been explained by SD1 during re-examination as follows:

> Q: Ms Ngu, still on page 11 and 12. My learned friend said based on the scale model at page 11 and 12, this actually is the representation made by the defendant. Your answer is 'Yes, but', you tried to explain something but was stopped by my learned friend. Can you now explain what you wanted to explain?
>
> A: Yea this is the scale model that we place inside our sales gallery to show our customers the actual contour of the land, but then *there is a disclaimer in our scale model* as well, *there may be changes from time to time and also it very much depends on the actual completion of the land* as well. So that's why the *scale model is just for our*

customers to refer. But then, if they want to view the land, we anytime welcome them to come and then *we are happy to bring them to the site* to have a look there. (Emphasis added.)

[30] A perusal of the amended statement of claim and reply reveals that the alleged misrepresentation was not pleaded. In fact, it was raised for the first time in P's witness statement (Q&A 15):

Q: Apakah kamu memohon daripada Mahkamah?

A: Tanah Lot 301 saya digunakan oleh Defendant sebagai pemaju Karak @ The Valley sebagai easemen untuk aliran sungai dan nilai Lot saya juga telah turun, aliran sungai tersebut adalah satu kacau-ganggu (*nuisance*). Saya patut dibayar pampasan untuk kegunaan tanah saya dan Defendan harus membayar gantirugi sebab *salahnyata* kepada saya akan keadaan Lot 301 sebelum saya bersetuju untuk membeli Lot 301.

[31] It is trite that parties are bound by their pleadings and the trial must be confined to the pleadings. In *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors and other appeals* [2015] 1 MLJ 773 at p 810, the Federal Court said:

[89] It is trite law that the *parties are bound by their pleadings* and the *trial of a suit must confine to the pleadings*. The court is *not entitled to decide a suit on a matter that has not been pleaded*. (Emphasis added.)

[32] P also failed to plead the requisite details or particulars of the alleged misrepresentation, as required under O 18 r 12 of the Rules of Court 2012 ('the ROC').

(1) Subject to paragraph (2), every pleading shall contain the *necessary particulars* of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words-

(a) particulars of any *misrepresentation*, fraud, breach of trust, wilful default or undue influence on which the party pleading relies;

[33] The SCJ erred in finding a duty of care based on the alleged misrepresentation, when it was not pleaded in the first place. The failure to particularise the alleged misrepresentation will render such allegation to become a bare allegation.

[34] Further, by failing to particularise the alleged misrepresentation, let alone particularise if such misrepresentation is fraudulent or negligent misrepresentation, the misrepresentation will be taken as an innocent misrepresentation that does not give rise to a claim for damages.

[35] In *Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim* [2003] 3 MLJ 460, the Court of Appeal said (at pp 468–471):

> Now, it is trite that the expression 'misrepresentation' is merely descriptive of a false pre-contractual statement that induces a contract or other transaction. But it does not reflect the state of mind of the representor at the relevant time. The state of mind of the representor at the time he made the representation to the representee varies according to the circumstances of each case. It may be fraudulent. It may be negligent. Or it may be entirely innocent, that is to say, the product of a mind that is free of deceit and inadvertence (see *Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd*. Put another way, a *misrepresentation is innocent 'where the representor believes his assertion to be true and consequently has no intention of deceiving the representee* (*Chesire & Fifoot, Law of Contract* (6th Ed)). It is the particular state of mind of the representor that determines the nature of the remedy available to the representee. So, if the misrepresentation is made fraudulently, then the representee is entitled to rescission and all damages directly flowing from the fraudulent inducement.
>
> ...
>
> In the case of an innocent misrepresentation, our law is the same as that of England before the passing of the Misrepresentation Act 1967 in that country. A *representee who has been induced by an innocent representation may sue for rescission and consequent restitution; but he may not recover damages*. This principle is based on the historical antecedent that a Court of Equity will only decree specific relief but not damages, the latter being the sole relief that Courts of Common Law will grant.
>
> ...
>
> It is clear that the defendant's *pleaded case alleges neither fraud nor negligence*. All that the defendant has pleaded is the misrepresentation about the access to the land. *Absent a specific and particularized plea of fraud or negligence, the defendant must be taken as asserting a case of innocent misrepresentation* in the sense already discussed. (Emphasis added.)

[36] As such, if P was to frame his case based on the alleged misrepresentation, P's remedy lies in rescission of the SPA. P cannot now allege negligence, nuisance or trespass and claim for damages far exceeding the SPA value.

No right of easement

[37] P's claim for easement presupposes the recognition of an easement on Lot 301 granted by P to D. That is not the case based on the facts here. As can be seen in the High Court case of *Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1993] 1 MLJ 443, an easement can only be created between the dominant and the servient lands. The court said (at p 458):

> It follows that all the four requirements for the creation of an easement of way are satisfied and these are:

(1) there must be dominant and servient lands;

(2) the easement must accommodate the dominant land;

(3) the dominant and servient land-owners must be different persons; and

(4) the right granted must be capable of forming the subject matter of a grant.

[38] Here, D is vendor/developer and not the adjoining landowner. As such, it is legally not possible for D to be treated as the dominant landowner using P's servient land as easement to discharge the water.

[39] Further, an easement cannot be presumed based on mere usage. It needs to be expressly granted and registered. This is clear from the Court of Appeal case of *Cottage Home Sdn Bhd v Wong Kau @ Wong Kon Lin & Anor* [2014] 3 MLJ 580 at pp 587–588 which said:

> [15] Easement is defined in s 282(1) of the code to mean 'any right granted by one proprietor to another, in his capacity as such and for the beneficial enjoyment of his land in accordance with the following provisions of this Chapter'. The relevant provisions on easement for our consideration are ss 282–291. Section 284 expressly states that *no right in the nature of an easement shall be capable of being acquired by prescription (that is to say by any presumption of a grant from long and uninterrupted user)*. Thus, in law, the right in the nature of an *easement cannot be presumed to have been granted by the proprietor of the servient land (Lot 1706) based on mere evidence of long and uninterrupted usage*. Section 286(1) of the code clearly states that the *grant of any easement shall be effected by an instrument* in Form 17A, or in the case of the grant by adjacent proprietors of cross-easements of support in respect of any party wall, by an instrument in Form 17B; and the easement shall come into existence on the date on which the instrument is registered. It is undisputed that there was no written or formal application by the respondent to the proprietor of Lot 1706 for a right of way in the nature of an easement. The issue here is whether the High Court was right in granting an equitable right of way to the respondent.
>
> ...
>
> [21] In view of the express provisions of the Code and the cases which we have referred to above the trial court had clearly erred in granting the respondents' application for an equitable right of way.

[40] Crucially, the sessions court had exceeded its jurisdiction by granting the easement fees and in effect granting/recognising the easement without registration of the same. This is because the sessions court does not have jurisdiction to deal with actions relating to immovable properties. Section 69 of the Subordinate Courts Act 1948 reads:

> Sessions Courts shall have no jurisdiction in actions, suits or proceedings of a civil nature —
>
> (a) relating to *immovable property* except as provided in sections 70 and 71;

[41] P contends that the sessions court has jurisdiction to hear and determine a suit for recovery of immovable property pursuant to s 70 of the Subordinate Courts Act 1948. As a statement of law, that is correct. However, the instant suit is not an action for recovery of immovable property.

[42] The SCJ erred in allowing easement fees of RM60,000 per year, which in effect granted/recognised an easement granted by P to D. Moreover, the easement fees of RM60,000 to be paid yearly until P decides that Lot 301 is no longer needed as an easement, is without any substantiation. The only evidence so-called tendered by P is his own estimation of loss. It is noteworthy that the SCJ had relied on this evidence and found that D had not challenged the same save for contending that it is excessive without proof.

> [34] Dalam keterangannya, Plaintif menerangkan bahawa beliau berhasrat untuk menanam pokok durian dan telah memberi keterangan bahawa kerugiannya adalah seperti berikut:
>
> CSN: Kalau air, air tak masuk, tanah sayan akan rata tempat. Saya akan dapat susun tanaman yang lebih teratur dalam linkurang kurang, lebih kurang boleh tanam lagi 15 pokok tempat iti.
>
> PP: Pokok apa?
>
> CSN: Pokok durian.
>
> PP: Ok. So?
>
> CSN: So kalau satu pokok, kalau besok berbuah sekurang-kurangnya pun satu tahun, satu kali musim pun 125 sampai 150 biji durian. Terpulang dari market jual-beli, kalau satu kilo RM30, satu pokok pun akan terjadi sampai RM4500 sampai RM5000. Jadi kalau 15 pokok untuk selama katakana senang-senang 30 tahun pun sudah banyak.
>
> PP: 30 tahun?
>
> CSN: Ah.
>
> PP: So agak-agak berapa untung yang kamu rugi?
>
> CSN: Rugi kalau 30 tahun, 15 pokok kali RM4500 boleh sampai RM60,000 kali lagi 30 tahun, 2 million, sekurang loh.
>
> PP: Dekat 2 million.
>
> CSN: Ah.
>
> (Mahkamah ini merujuk kepada keterangan SP-1 di muka surat 77 Nota Keterangan)
>
> ...
>
> [41] Mahkamah ini mendapati bahawa Plaintif menuntut gantirugi sebanyak RM60,000-00 setahun untuk easement bagi kegunaan tanah Plaintif oleh Defendan untuk pengaliran sungai dalam pembangunan Defendan. Keterangan

Plaintif tidak dicabar oleh Defendan. Defnedan hanya mengatakan amaun ini adalah berlebihan tanpa menunjukkan bukti.

[43] The SCJ erred in making the aforesaid findings considering:

(a) P's evidence, relied upon by the SCJ in granting the yearly RM60,000 easement fees, was only given during re-examination, in response to D's counsel's challenge.

> Q: Ok dan juga peguam katakan tuntutan kamu dalam mahkamah ini adalah RM250,000 untuk ganti rugi dan juga uh RM60,000 setahun untuk ismen. Bagaimana kamu uh dapati amaun itu?
>
> Dapat ...
>
> A: Kalau air, air tak masuk, tanah saya akan rata tempat. Saya akan dapat susun tanaman lebih beratur dalam lingkugan kurang, lebih kurang boleh tanam lagi 15 pokok tempat itu ...

(b) considering that such 'evidence' was given only during re-examination and not during examination-in-chief, D cannot be said to have not challenged such evidence;

(c) in any event, the burden of proof is not on D to prove that the amount claimed is excessive but rather for P to prove his loss;

(d) save for the calculation produced above, which in itself is speculative and based on estimation, P did not put forth any evidence as to how many trees Lot 301 can accommodate and how much fruits they can produce; and

(e) in light thereof, it was P who failed to prove that the alleged easement is worth RM60,000 yearly and up to RM2m which far exceeds the monetary limit of the sessions court.

Damages not proven

[44] The SCJ allowed P's special damages claim of RM250,000 for diminution of land value. However, a perusal of the GoJ reveals that the SCJ did not make any finding on whether P proved its special damages claim of RM250,000. It is trite that special damages must be strictly proven as propounded in the Federal Court case of *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324 at p 327.

> It is a well-established principle that *special damages in contrast to general damages, have to be specifically pleaded and strictly proved*. They are recoverable only where they can be included in the proper measure of damages and are not too remote.

[45] Quite apart from not proving that there was any diminution of land

value, during cross-examination P had in fact admitted that Lot 301 is now worth more than the original purchase price of RM286,500:

> Q: Encik Chia beli lot ini dengan harga RM286,500.
>
> A: Ye
>
> ...
>
> Q: Tuntutan Encik Chia untuk turun nilai sebanyak RM250,000. Betul?
>
> A: Betul.
>
> Q: So maksudnya, nilai sekarang untuk lot tersebut hanya bernilai RM36,500.
>
> Itu kes Encik Chia? Jangan pandang kepada peguamcara uh Encik Chia. You kena jawab semua.
>
> A: Ini tuntutan saya untuk saya punya tuntut apa yang tak mau buat, saya tuntut balik. Apa kerugian, saya tak boleh tanam keluasan.
>
> ...
>
> Q: Tuntutan Encik Chia.
>
> A: Ah.
>
> Q: Adalah untuk penurunan nilai tanah lot 301 atau tidak?
>
> A: Yea.
>
> Q: Yea ah. So maksudnya, Encik Chia menyatakan bahawa nilai lot 301 sekarang tidak bernilai RM286,500. Betul? Tidak lagi bernilai RM286,500.
>
> A: Tak ada, mesti nilai. *Mesti lebih*, sudah tiga tahun, empat tahun.

[46] Given P's admission on the same, the SCJ ought to have found that P had failed to prove his special damages for diminution of land value. Instead, it was allowed without any grounds proffered. It cannot be gainsaid that P's aforesaid evidence tantamount to an admission of there being no diminution of land value. Admissions are the strongest form of evidence possible and should not be ignored (see the High Court case of *Esso Malaysia Bhd v Hills Agency (M) Sdn Bhd & Ors* [1994] 1 MLJ 740 at p 752).

APPEAL ALLOWED

[47] For the reasons above, I am of the opinion that the SCJ had erred:

(a) in finding that D owes a duty of care to ensure that rain water does not flood into P's land and had breached such duty;

(b) in finding that D caused the water to enter into Lot 301 and thereby caused nuisance to P;

(c) in relying on the alleged misrepresentation when it was not pleaded;

(d) in failing to consider the provisions of the SPA;

(e) in recognising the easement and consequently granting easement fees; and

(f) in allowing P's claim when he had failed to prove his loss.

[48] In my view, appellate intervention is justified in this case. P's claim should have been dismissed. I therefore allowed the appeal and set aside the judgment of the SCJ. I ordered P to pay costs, here and below, of RM15,000 to D.

STRIKING OUT APPLICATION

[49] P filed the striking out application to strike out the appeal. Based on his affidavit in support affirmed on 14 December 2020, the grounds relied on by P are as follows:

(a) D allegedly admitted their wrongdoing and could have avoided the tort had they exercise duty of care;

(b) D allegedly refuse to be bound by the four corners of their pleadings, by now raising obnoxious defence that was never pleaded in proclaiming themselves as God, ie, act of God;

(c) D has stated that the water flow is a natural flow but could not produce the consent of the head of state that it was a natural flow of river. There were apparently evidence and admission showing that it was a man made drainage in which P's predicament is allegedly predictable and expected;

(d) D questioned the negative demeanour of P and allegedly took the position that P does not deserve justice although D knew that this court does not have the benefit of seeing, viewing and observing the trial by the SCJ;

(e) D's statement on the negative demeanour of P is allegedly made in prejudice to embarrass him by discriminating his background, education, age and occupation;

(f) D is trespassing P's rights under art 8 of the Federal Constitution to resolve a bad case;

(g) D has allegedly misdirected the sessions court and this court to paint the picture that P was seeking for easement land rights although the damages claimed by P was for land value depreciation and other general damages. P was only granted rent to compensate the use of his easement 'until the day the appellant decided in goodliness to reconstruct the drainage';

(h) D allegedly allowed the sessions court to trial on easement issue and now pretend to be prejudiced by jurisdiction issue when the decision was not in their favour, which is an abuse of process of court;

(i) D is using the appeal as a stay of execution which is not permitted under the Courts of Judicature Act 1964;

(j) D had provided P's solicitors one version of the index of record of appeal to approve while filing another version to the court out of time;

(k) D has failed to serve the record of appeal within the prescribed time;

(l) D had obtained the sealed court order on 3 November 2020 ('sealed order'), by 'indicating wrong reference of party, to delay and/or avoid liabilities of the sessions court and abuse this court's process to cause prejudice'; and

(m) D's conduct in refusing the amendment to the sealed judgment is to cause delay by abusing the process of court.

[50] The striking out application is made under O 18 r 19(1)(a), (1)(b), (1)(c) and/or (1)(d) of the ROC ('O 18 r 19'). However, O 18 r 19 only applies to striking out *'pleading or the endorsement, of any writ'*. P is relying on O 18 r 19 to strike out the appeal, which is not a pleading or an endorsement of writ. As such, P's reliance on O 18 r 19 is clearly misplaced. On this ground alone, the striking out application ought to be dismissed.

[51] Furthermore, the grounds of the striking out application largely relate to the merits of the appeal. By virtue of s 28(1) of the Courts of Judicature Act 1964, D is entitled to file the appeal so long as the amount in dispute or the value of the subject matter is more than RM10,000. In the present case, the amount in dispute or the value of the subject matter is obviously more than RM10,000. Since the sessions court has allowed, inter alia, P's claim for depreciation of land value for RM250,000. D is therefore entitled to file the appeal.

[52] As such, the grounds of the striking out application, which relate to the merits of the appeal, ought to be dealt with at the hearing of the appeal proper. P should not canvass those grounds to strike out the appeal. Be that as it may, I will address the grounds relied by P, as listed above.

Answers to the grounds for striking out

[53] As regards (a) above, D did not admit to any alleged wrongdoing or allegedly committing any tort. This ground is unsubstantiated. In any event, this issue relates to the merit of the appeal and cannot be used as ground for striking out.

[54] As regards (b) above, it is untrue that D has never raised the defence of 'act of God' in its pleaded case. D had raised this defence in its statement of defence.

> 4.1 ...
>
> (a) Lot Plaintif tersebut berada di *kawasan yang paling rendah* dalam Tanah Defendan tersebut; dan
>
> (b) Pada kesemua masa yang material, ia terdapat satu *aliran utama asal* yang menghala masuk dari luar sempadan bahagian utara Tanah Defendan dan merentasi kebanyakan 313 lot-lot yang berada di dalam Tanah Defendan tersebut, di mana air dan/atau air hujan adalah mengalir dari cabang-cabang aliran lot-lot lain termasuk Lot Plaintif ('Aliran tersebut') tersebut sebelum ia dilepaskan ke sungai besar di luar Kerau @ The Valley ('Sungai Besar');
>
> (c) *Secara semulajadi*nya, air sememangnya akan melalui Aliran tersebut sebelum sampai ke Sungai Besar memandangkan bahawa Lot Plaintif tersebut berada di Kawasan yang paling rendah.
>
> ...
>
> *13.1 Defendan bukannya pihak yang menyebabkan air mengalir ke dalam Lot Plaintif tersebut (sekiranya ada), memandangkan bahawa air akan mengaliri melalui Aliran tersebut secara semulajadi* walaupun tanpa Kotak Pemisah yang dibinakan oleh Defendan tersebut;.

[55] In this regard, the reference to 'act of God' relates to a natural occurrence outside the control or power of D. This is obvious from para 4 of the memorandum of appeal:

> Hakim yang Bijaksana telah terkhilaf dari segi fakta dan/atau undang-undang apabila gagal untuk mempertimbangkan bahawa aliran air adalah *kejadian semula jadi* atau 'act of God' yang mana ia berada di luar kawalan dan/atau kuasa dan/atau milikan Perayu.

[56] In light of the above, D did not depart from its pleading.

[57] In (c) above, it is alleged there is no evidence to show that the water is flowing into P's land as a natural flow. This is an issue touching on the merit of the appeal and should not be raised at striking out stage. In any event, there is evidence to show that the water is flowing into P's land as a consequence of natural land profile/topography of P's land and its surrounding lands. Which formed a natural stream that brings natural flow of the water and it is not due to the man made drainage, as alleged by P.

[58] In (d), (e) and (f) above, it is alleged that D raised the issue of P's demeanour for the purpose of embarrassing him by discriminating his

A background, education, age and occupation. Nothing could be further from the truth. D's ground of appeal which relates to P's demeanour is premised on his purported evasiveness in giving evidence at the sessions court. It has nothing to do with P's background, education, age and occupation. P's contention that D is trespassing his rights under art 8 of the Federal
B Constitution (equality before the law) is misconceived.

[59] Furthermore, P's demeanour is only one of the grounds relied by D in the memorandum of appeal. As such, the whole appeal cannot be struck out based on this ground alone. In any event, it was unnecessary for me to consider
C this ground in arriving at my decision to allow the appeal.

[60] In (g) above, P alleges that the damages which he claimed was only for land value depreciation and other general damages. P was only granted rent to
D compensate the use of his easement due to D's alleged admission that they will not reconstruct the drainage to resolve the issue. D has misdirected the sessions court and this court to paint the picture that P was seeking for easement land rights.

E **[61]** However, a perusal of the amended statement of claim reveals that P's claims are not limited to damages for land value depreciation and other general damages. P had specifically averred and claimed for an easement to be granted and/or recognised in return for easement payment. The relevant portions of the amended statement of claim reads:

F

> 11. Defendan menggunakan Lot Plaintif sebagai *easemen* untuk aliran air dan air hujan tanpa keizinan atau persetujuan Plaintif.
>
> 12. Plaintif tidak pada bila-bila masa membenarkan atau bersetuju dengan Defendan untuk Lot Plaintif digunapakai sebagai *easemen* untuk aliran air atau air
G hujan.
>
> ...
>
> 14. Oleh yang demikian Plaintif memohon perintah/penghakiman terhadap Defendan seperti berikut:-
>
H i. RM60,000.00 setahun untuk Lot Plaintif digunakan sebagai *easemen* pengaliran air bermula dari 1-1-2019 sehingga Plaintif berpendapat dan memutuskan Lot Plaintif tidak diperlukan sebagai easemen;

[62] In (h) above, P argued that D allegedly allowed the sessions court to trial
I on the easement issue and now pretend to be prejudiced when the decision was not in their favour. However, D has challenged the sessions court's jurisdiction to deal with the issue of easement during the submission stage. Where D had submitted in its written submission that the sessions court should have no jurisdiction to decide on issues relating to easement. As such, D's challenge on

the jurisdictional issue was not only raised following the decision against them, as alleged by P.

[63] As regards (i) above, P's contention that D is using the appeal as a stay of execution is without merit. Obviously an appeal does not operate as a stay. This cannot form a ground to strike out the appeal.

[64] In (j) above, P alleges that there is a difference between: (i) the version of the index of record of appeal for P's solicitors to approve; and (ii) the version of the index of record of appeal filed herein. This allegation is unsubstantiated. The facts are these:

(a) the Index of the Record of Appeal was served to P's current solicitors, Messrs Aaron Pang & Co ('APC'), for approval vide D's solicitors' letter dated 2 September 2020;

(b) APC vide its letter dated 4 September 2020 commented as follows:

> b) You have indicated Item No. 6 Alasan Penghakiman, which we have no knowledge that the grounds were ready or collected by you. In any event, you could prepare the grounds to be included in your Rekod Rayuan Tambahan;
>
> d) Possible Item No. 1 or 6 of your Draft Index — Gambar-Gambar Tanah There was a video recording tended in and marked as Exhibits, however, this was never shown or indicated in your Draft Index;
>
> e) Possible Item No. 11 of your Draft Index — Fotografi There was an additional video recording showing the aftermath of the tort which was tended in and marked as Exhibits, however, this was never shown or indicated in your Draft Index.

(c) following the said comments, D removed the 'Alasan Penghakiman' and added in the video recordings and photos into the index of the record of appeal filed herein.

[65] The aforesaid facts are contained in D's affidavit in reply affirmed on 30 December 2020 and was never challenged by P. Hence, P is taken as admitting to the explanation made by D.

[66] In (k) above, P argued that D has allegedly failed to serve the record of appeal within the prescribed time. In this connection, D had filed an application vide encl 31 for an extension of time and to regularise the filing and service of the record of appeal. This issue will be discussed later.

[67] In (l) above, P alleges that D obtained the sealed order on 3 November 2020 by indicating wrong reference of party in order to delay or avoid liabilities of the sessions court judgment and to cause prejudice to P. This allegation is devoid of merit. The facts are these:

(a) before the sealed order was filed and extracted from the sessions court, the draft order had been served to P's previous solicitors, Messrs M Raman & Associates ('former solicitor'), for approval;

(b) in approving the draft order, the former solicitor did not make any changes to the wrong reference of party;

(c) following the former solicitor's approval on the draft order, D had filed the same into the sessions court and subsequently obtained the sealed order; and

(d) in light of the above, it is clear that the wrong reference of party in the sealed order arose from a genuine mutual clerical oversight with no intention to delay or avoid liabilities nor to cause prejudice, as alleged by P.

[68] Further, it is misleading to contend in (m) above that D's conduct in refusing the amendment to the sealed judgment is to cause delay by abusing the court's process, considering:

(a) D never refused to the amendment made to the reference of party;

(b) before the former solicitor filed in the sealed judgment on 9 December 2020, the former solicitor had vide its letter dated 25 November 2020, served a draft judgment to D's solicitor for approval;

(c) in this draft judgment, P intended to change the costs of RM10,000 as awarded by the sessions court to RM23,201;

(d) it is due to the aforesaid reason that D cannot agree on the amendment made in the draft judgment;

(e) as such, D's solicitors sent a letter dated 1 December 2020, expressing its disagreement with the re-filing of the draft judgment by stating:

> Further, we contend and will contend that the Learned Session Court Judge only granted the costs of RM10,000.00 and did not grant any 'Kos Tindakan' to the plaintiff'. This had been duly confirmed and approved by your good firm in the previous Draft Judgment.

(f) in the said letter, D's solicitors reminded P that an amendment application is needed to vary the sealed judgment.

> Kindly be informed that the Judgment dated 27.07.2020 had been sealed ('Judgment'). In view thereof, we are unable to agree with the re-filing of any Draft Judgment and/or Judgment. Kindly file an amendment application to vary the Judgment pursuant to Order 20 Rule 11 of Rules of Court 2012 if you have any issue/amendment to the same.

(g) however, despite filing an amendment application to the sessions court, the former solicitor had again unilaterally amended the draft judgment by changing the costs of RM23,201 back to RM10,000 and had it filed into the sessions court.

[69] In light of the aforesaid, it is evident that there is no abuse of process by D. If at all, it is P who abused the court's process. This is especially so when the former solicitor is no longer acting for P in the sessions court when its sealed judgment was filed on 9 December 2020. As P's current solicitors APC had filed the notice of change of solicitors replacing the former solicitor in the sessions court on 27 November 2020.

[70] Moreover, the 'wrong reference to party' in the sealed order does not appear to be prejudicial. It referred to P as 'Responden', when rightly it should state 'Plaintif'. Such error is apparent on the face of the record and would not have confused any of the parties.

Enclosure 31

[71] D filed an application vide encl 31 for an abridgement of time and to regularise the filing and service of the record of appeal. I allowed the said application.

[72] The facts are these. Upon lodgement of the appeal, the notice of appeal was filed and served to P's then solicitors, the former solicitor, on 7 August 2020. The prescribed time period for D to file the record of appeal is within one month from the date of the filing of the notice of appeal, ie on or before 7 September 2020. After the notice of appeal was filed and served, the former solicitor informed D's solicitors via email on 11 August 2020 that he is no longer acting for P and told D's solicitors to serve the notice of appeal to P's new/current solicitors, APC. However, as D's solicitors did not receive any notice of change of solicitors from APC, D's solicitors provided the draft index of record of appeal to the former solicitor on 19 August 2020.

[73] On 25 August 2020, the former solicitor informed D's solicitors that all cause papers are to be forwarded to APC, as instructed in his earlier email. In a telephone conversation, D's solicitors, Mr Roger Leong Chun Lim ('Roger'), told the former solicitor that they can only serve the notice of appeal and draft Index of Record of Appeal to APC after APC files their notice of change of solicitors. Despite this, APC did not file any notice of change of solicitors.

[74] On 27 August 2020, Roger took the initiative to call APC to check whether they will be filing the requisite notice of change of solicitors. During this telephone conversation, Mr Aaron Pang ('Aaron') of APC asked for Roger's

email address and informed Roger that he will file in the notice of change of solicitors and serve it to D's solicitors immediately. Roger then on the same day provided his email address to Aaron through WhatsApp messages, to enable Aaron to serve the notice of change of solicitors to D's solicitor through Roger's email address. However until 28 August 2020, D's solicitors did not receive any notice of change of solicitors from APC. Roger highlighted this to Aaron.

[75] APC finally filed the notice of change of solicitors and served the same to D's solicitors through Aaron's email on 1 September 2020. Thereupon on 2 September 2020, Ds solicitors served a copy of the notice of appeal and the draft Index of Record of Appeal to APC for approval. APC provided their comments on the draft Index of Record of Appeal to D's solicitors on 4 September 2020. The record of appeal was filed into court on 7 September 2020 ie just on time.

[76] On 7 September 2020, Roger had also instructed his colleague, Cik Alya Tadwini bt Talhah ('Alya'), to serve the record of appeal to APC at its then address at No 30, Jalan Bakti Desa, Taman Desa, 58100 Kuala Lumpur. This address was stated in APC's notice of change of solicitors as the address for service ('address for service'). At 3pm on 7 September 2020, Roger was informed by Alya that APC's office is a residential house and there was no one coming out to receive service. At 3.20pm on the same day, Roger sent WhatsApp messages to Aaron to inquire as to who can accept service of the record of appeal.

[77] Shortly after the message above, Alya informed Roger a person named Mr Ng Eng Chin ('Ng') had returned to APC's office at the address for service. Alya approached Ng at the front gate of the office to serve the record of appeal. Ng accepted service of the record of appeal for and on behalf of APC at 3:39pm, stating a MyKad identity number 861127–33–5233. Alya informed that she saw Ng enter into APC's office, after accepting the service.

[78] However, Aaron had around 3.35pm informed Roger that he is currently out of office and requested for the record of appeal to be served the next day on 8 September 2020 at 11am. Roger replied at 3.49pm and informed Aaron that Ng had accepted service on behalf of APC. At 4.01pm, Aaron requested for the record of appeal to be served 'again' as he is allegedly unable to verify who this person is (Ng) who had returned to APC's office.

[79] Arising from Aaron's aforesaid request, Roger instructed Alya to serve another set of the record of appeal to the address for service on 8 September 2020. In their letter of service, D's solicitors put on record that the record of appeal had been served on 7 September 2020 and the service of the same had been accepted by Ng on behalf of APC. Around 11am on 8 September 2020,

the record of appeal was served again at the Address for Service for the second time by Alya.

[80] At a case management on 26 October 2020, the learned senior assistant registrar of the High Court informed D's solicitors that the record of appeal was filed under a wrong heading in the e-filing system. It was filed under 'memorandum rayuan', when it should have been under 'rekod rayuan'. D was directed to refile the record of appeal under the correct heading. Following the direction of the senior assistant registrar, D refiled the record of appeal under the correct heading in the e-filing system on 26 October 2020.

[81] As far as I am concerned however, the record of appeal was filed within the prescribed time, ie 7 September 2020, albeit under a different heading in the e-filing system.

[82] On 14 December 2020, P filed the striking out application to strike out the appeal. In connection therewith and vide its email dated 10 February 2021 at 4:59pm, APC served P's affidavit in reply ('affidavit') to D's solicitors. The affidavit was only filed into court on 11 February 2021. Actually, the affidavit was supposed to have been filed on or before 15 January 2021 pursuant to my direction. After that date on 29 January 2021, P requested for an extension of time to file the affidavit. I acceded to his request and directed him to file the affidavit on or before 10 February 2021.

[83] More crucially, the affidavit was not affirmed before a commissioner for oaths. At the hearing before me on 18 June 2021 (more than four months after filing of the affidavit), the affidavit remains unsworn. The excuse of Movement Control Order lockdown is not applicable in the present case. No leave was sought from me by P's counsel to use the defective affidavit. This defect in the affidavit is not merely an irregularity in form but is one that goes to the substance. The absence of a commissioner for oath's attestation means that the document was not sworn as required and is thereby not an affidavit (see the High Court case of *Ipmuda Trading Sdn Bhd v Khoo Kiat Piau t/a Ying's Trading Co & Anor* [1996] 5 MLJ 637 at p 644). In these circumstances, I would have been entitled to disregard the affidavit. Nevertheless, I still considered the affidavit for the purposes of the hearing that took place before me.

[84] In the affidavit, P contended that the record of appeal Vol 2(1) (Part B & C) were not re-filed. Upon receiving the affidavit on 10 February 2021, D's solicitors realised that the record of appeal Vol 1 (Part A) was inadvertently filed twice whereas record of appeal Vol 2(1) (Part B & C) was not filed instead. Upon realising the same, D had again refiled the whole record of appeal on 17 February 2021.

[85] I note, however, that all three volumes of the record of appeal were served to P's solicitors at the Address for Service on 7 September 2020 (which was acknowledged receipt by Ng). And again on 8 September 2020 (which was acknowledged receipt by Aaron). The complete set of the record of appeal was e-filed on 7 September 2020, albeit under a different heading.

[86] On these facts, I am satisfied that the complete set of the record of appeal was filed and served within the prescribed time. Namely on 7 September 2020. But to avoid any dispute and for the avoidance of doubt, I allowed encl 31. I made the following orders. That the time for D to file and serve the record of appeal be extended. Alternatively, the record of appeal filed on 17 February 2021 be regularised and accepted as complete and in order. Further, the record of appeal served to P on 7 September 2020 (which was acknowledged receipt by Ng) and on 8 September 2020 (which was acknowledged receipt by Aaron) be regularised and accepted as good service and in order.

[87] I am of the view that P will not be in anyway prejudiced by an order in terms of encl 31. It seems to me that P's solicitors' delay in filing the notice of change of solicitors contributed to the record of appeal being filed on the last day of the prescribed time. In exercising my discretion to allow encl 31, I relied on the following provisions.

[88] Firstly, O 2 r 1 of the ROC which reads:

> (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been non-compliance with the requirement of these Rules, the *non-compliance shall be treated as an irregularity* and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.
>
> (2) These Rules are a procedural code and subject to the *overriding objective of enabling the Court to deal with cases justly*. The parties are required to assist the Court to achieve this overriding objective.
>
> (3) The Court or Judge may, on the ground that there has been such non-compliance as referred to in paragraph (1), and on such terms as to costs or otherwise as it or he thinks just, bearing in mind the overriding objective of these Rules, *exercise its or his discretion* under these Rules to allow such amendments, if any, to be made and to make such order, if any, dealing with the proceedings generally as it or he thinks fit in order *to cure the irregularity*. (Emphasis added.)

[89] Secondly, O 3 r 5 of the ROC which reads:

> (1) The Court may, on such terms as it thinks just, by order *extend or abridge*

the period within which a person is required or authorised by these Rules or by any judgment, order or direction, to do any act in any proceedings.

(2) The Court may extend any such period as referred to in paragraph (1) although the application for extension is not made until after the expiration of that period. (Emphasis added.)

[90] Further, I was guided by the following authorities. In *Cergas Tegap Sdn Bhd (In Liquidation) v SAP Holdings Bhd & Anor* [2013] 8 CLJ 745, the Court of Appeal allowed an extension of time for the record of appeal to be filed. The court said (at pp 762–764):

[40] In our judgment, the applicant should not be faulted by the negligence of its solicitors in not filing the record of appeal within the prescribed time. ...

...

[43] ... it cannot be said that the respondent were prejudiced by the delay on the part of the applicant/appellant in not filing the record of appeal within time ...

[91] Here, the record of appeal was filed within time ie on 7 September 2020, albeit under a different heading. It is not a case where the record of appeal was filed outside the prescribed time. The record of appeal had also been served to P within time on 7 September 2020 (which was acknowledged receipt by Ng). And again one day later on 8 September 2020 (which was acknowledged receipt by Aaron). It cannot be said that P has suffered any prejudice.

[92] In *Cosway (M) Sdn Bhd & Anor v Gan Poh Im* [2006] 1 MLJ 568; [2005] 1 CLJ 573, the Court of Appeal allowed an extension of time for the memorandum of appeal to be filed and served. The court said (at p 588):

In the present case, the application is only for extension of time to file and serve the memorandum of appeal. The appeal record had been filed earlier within the stipulated time. Even the memorandum of appeal had been *filed earlier together with the appeal record, albeit erroneously*. After realising the error, the appellants' solicitors filed the memorandum of appeal out of time and this application, even though made after the notice of preliminary objection, was merely to regularise the filing and service of the memorandum of appeal. In the circumstances, we *do not think that the conduct of the appellants' solicitors could be regarded as a blatant disregard of the rules of court*. There was indeed a misapprehension of the rules of court but *remedial steps were taken to complywith the rules. As stated by this court in Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram* [1998] 4 MLJ 297; [1998] 4 CLJ 883, the *primary consideration in exercising discretion to extend time is whether the party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances*.

[93] After realising that the record of appeal was filed under a different heading in the e-filing system, D refiled the record of appeal on 26 October 2020. After realising that there was an inadvertent oversight in omitting the filing of the record of appeal Vol 2(1) [Part B & C] during the refiling of the record of appeal, D had again refiled the record of appeal on 17 February 2021, together with encl 31 on 19 February 2021. D had taken remedial steps to comply with the rules. D had demonstrated that there was no intention to disregard or flout the rules.

[94] P contends that the record of appeal was not served within the prescribed time, as the record of appeal was only acknowledged receipt by Aaron on 8 September 2020 (one day late). However, the record of appeal was served at the address for service and was received by Ng because Aaron was out of office on 7 September 2020. If there was no one available at the address for service to accept service of the record of appeal, D cannot be faulted for serving the record of appeal on Ng, a person who had access to P's solicitors' office.

[95] The record of appeal was again served on 8 September 2020, which was acknowledged receipt by Aaron. In other words, P has obtained a copy of the record of appeal since 7 September 2020 and 8 September 2020. Further, when Aaron requested the record of appeal to be served to his office again on 8 September 2020 at 11am, P must naturally be estopped from contending that the record of appeal was served late when it was in fact served on the date requested by himself.

[96] In this regard, the Court of Appeal case of *Annie Quah* is instructive. The court said (at p 8):

> If one of the parties to litigation is faced with two mutually exclusive alternatives and he elects to pursue one then he will be estopped from retreating from the position he has adopted by his election.

CONCLUSION

[97] In summary, I made the following orders:

(a) the appeal is allowed with costs of RM15,000, here and below, and the judgment of the SCJ is set aside;

(b) the striking out application is dismissed with no orders as to costs; and

(c) D's application for an extension of time to file and serve the record of appeal and for the regularisation of the record of appeal filed on 17 February 2021 vide encl 31 is allowed with no orders as to costs.

Appeal allowed.

Reported by Ahmad Ismail Illman Mohd Razali